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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

IN THE MATTER OF)
PETITION FOR A DECLARATORY RULING)
REGARDING THE JUST AND REASONABLE)
NATURE OF, AND STATE LAW CHALLENGES)
TO, RATES CHARGED BY CMRS PROVIDERS)
WHEN CHARGING FOR INCOMING CALLS)
AND WHEN CHARGING FOR CALLS IN WHOLE)
MINUTE INCREMENTS)

DA No. 97-2464

Docket No. _____

To: The Commission

**COMMENTS OF LIBERTY CELLULAR, INC.
AND NORTH CAROLINA RSA 3 CELLULAR TELEPHONE COMPANY**

Liberty Cellular, Inc. ("Liberty") and North Carolina RSA 3 Cellular Telephone Company d/b/a Carolina West ("Carolina West"), by their attorneys and pursuant to FCC Rule Section 1.415, respectfully submit these Comments in response to the Petition For Declaratory Ruling filed by Southwestern Bell Mobile Systems, Inc. ("SBMS") released by Public Notice for comment on November 24, 1997 (DA No. 97-2464) (hereafter "Petition"). Through these comments, Liberty and Carolina West support SBMS's petition that the FCC issue the following declaratory ruling: (1) that Congress and the Commission have established a general preference for competition over regulation in the CMRS marketplace, (2) that rounding up and charging for incoming calls are common industry practices that are

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not unjust or unreasonable under Section 201(b) of the Act, (3) that "call initiation" in the CMRS context occurs when the customer activates the phone to place or receive a call, (4) that the term "rates charged," as used in Section 332(c)(3) of the Act, includes at least the choice of which services to charge for and how much to charge for them, (5) that challenges to the rates charged to end users by CMRS providers are exclusively governed by federal law, and (6) that state law claims directly or indirectly challenging CMRS rates are barred by Section 332(c)(3) of the Act.

Introduction

1. Liberty is a Kansas corporation headquartered in Salina, Kansas. Liberty is owned by twenty-five local exchange carriers, directly or through affiliates, who participate in regional ownership of cellular radio facilities, common carrier point-to-point microwave radio service facilities, and a fiber optic network, as well as related, supporting facilities. All of Liberty's cellular facilities are in Kansas Rural Service Areas.

2. Carolina West is the licensee of cellular radiotelecommunications service stations KNKN 693 and KNKN 881, serving Markets 567 B1 - NC RSA 3 - Ashe and 566 B1 - NC RSA 2 - Yancey, respectively. As CMRS providers, Liberty's and Carolina West's interest in this matter derives from their interest in having oversight of the billing practices of cellular providers remain strictly within the federal domain.

3. Liberty and Carolina West support SBMS's proposed declaratory ruling with regard to allowing market forces, not states, to form CMRS rates and billing practices as is the standard set forth under Section 332(c)(3) of the Act.

Reliance On Competition
Not Regulation Is Preferable In The CMRS Marketplace

4. Liberty and SBMS agree with SBMS's contention that the Congress and the FCC have established a general preference for competition in the CMRS marketplace. In fact the Telecommunications Act of 1996 is filled with examples of the Congress' attempt to deregulate the telecommunications industry in favor of letting competitive forces dictate. For example, in merely adopting and implementing the use of competitive bidding to license spectrum in the personal communications service, Congress and the Commission have shown their preference for market forces over regulation.

5. Allowing rates and billing practices to be controlled by states would defeat the pro-competitive standard that has been established thus far. Rate plan structures and billing practices are merely business strategies. It is these business strategies which allow service providers to compete effectively in the marketplace and to distinguish themselves among consumers. The competing strategies designed and implemented by CMRS providers ultimately serve consumers because service providers end up

offering rate plans that customers want, rather than plans devised by governmental dictates.

**Charging For Incoming Calls And Rounding Up
Are Not Unjust Or Unreasonable Under Section 201(b) Of The Act**

6. Liberty and Carolina West support SBMS's argument that charging for incoming calls and rounding up are not unjust or unreasonable under Section 201(b) of the Act. As SBMS points out in its petition, the FCC has traditionally determined reasonableness of a rate structure, "as reasonably related to the cost of providing service."^{1/} Charging customers for calls on a per minute basis is one of the simplest and most accurate ways of charging for calls, and still reflective of the costs of providing service to the customer. Billing customers for a small increment such as "per second" would force carriers to increase rates for the smaller increment so as to cover the additional cost of calculating and billing for the service. Likewise, the actual cost of providing customers with outgoing service is the same as providing incoming service, therefore billing for incoming and outgoing calls in the same way is equally reflective of actual costs.

7. Liberty and Carolina West also support SBMS's request that the FCC determine that "call initiation" in the CMRS context may occur when the customer activates the phone to place or receive a call. This definition of "call initiation" is commonly used and

^{1/} Memorandum Opinion and Order, In re United States Transmission Systems, Inc. (Revisions to Tariff F.C.C. No. 1), 66 F.C.C. 2d 1091 ¶ 5 (1977).

recognized by service providers, and Liberty and Carolina West support the right of carrier to utilize this definition of "call initiation." The moment a call is "initiated" has not been disputed by the Commission or by regulatory authorities in the jurisdictions where Liberty and Carolina West provide service.

8. Placing just and reasonable rate and billing practices under such scrutiny would defeat the purpose of Section 201(b) of the Act which is to protect the consumer. Without the ability to offer these different types of rate structure options, the variety of service offerings to consumers would become stagnant. The restrictions proposed by the plaintiff in the Massachusetts case at issue in SBMS's petition would mean that customers would have fewer and fewer choices in the CMRS arena and ultimately consumers will suffer. Whereas, allowing service providers flexibility (within the boundaries of Section 201(b)) when implementing their rate plans enables customers to gain a wide variety of options in selecting not only their rate plans but also which service provider they want to use.

**Challenges To The Rates Charged To End Users
By CMRS Providers Are Exclusively Governed By Federal Law**

9. Liberty and Carolina West support the conclusion that the term "rates charged," as used in Section 332(c)(3) of the Act, includes at least the provider's choice of which services to charge for and how much to charge for them. Liberty and Carolina West believe that the term "rates charged" should include any and all aspects of rate making decisions made by the CMRS provider. If

states are allowed to intrude upon some aspects of rate making decisions by CMRS providers then ultimately providers in different states could have widely varying rate programs which would be contrary to Congress' goal of a nationwide seamless rate structure^{2/}

10. In addition, Liberty and Carolina West agree that lawsuits regarding these rate structuring issues belong in federal court. If the Commission deems that "rates charged" includes the provider's choice of which services to charge for and how much to charge for them, then it logically follows that the FCC would deem disputes regarding those issues belong in federal court. Allowing states to claim jurisdiction in these matters will only further diminish Congress' intent to reserve CMRS rate issues as a federal matter.

^{2/} See H.R. Rep. No. 103-111, at 260 (1993) and In re Comcast Telecomm Litigation, 949 F. Supp. 1193, 1204 (E.D. Pa. 1996).

Accordingly, Liberty and Carolina West support SBMS's Petition For Declaratory Ruling regarding the just and reasonable nature of, and state law challenges to, rates charged by CMRS providers when charging for incoming calls and charging for calls in whole-minute increments as a means to promote competition among carriers and the availability of diverse services to the public.

Respectfully submitted,

LIBERTY CELLULAR, INC.

and

**NORTH CAROLINA RSA 3
CELLULAR TELEPHONE COMPANY**

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December 24, 1997

CERTIFICATE OF SERVICE

I, Loren B. Costantino, a legal assistant in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 24th day of December, 1997, sent by hand-delivery, copies of the foregoing COMMENTS OF LIBERTY CELLULAR, INC. AND NORTH CAROLINA RSA 3 CELLULAR TELEPHONE COMPANY to the following:

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